

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRY HARRIS :  
 :  
 v. : CIVIL ACTION  
 :  
 : NO. 05-526  
 SOUTHEASTERN PENNSYLVANIA :  
 TRANSPORTATION AUTHORITY, et al. :

MEMORANDUM

**Padova, J.**

**August 8, 2005**

Plaintiff Terry Harris brought this action pursuant to 42 U.S.C. § 1983 against Defendants Southeastern Pennsylvania Transportation Authority ("SEPTA") and John Grostas for violating his Fourth Amendment right to be free from unreasonable searches and seizures and his Fourteenth Amendment right to be free from the deprivation of property without due process of law. On May 4, 2005, the Court granted Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted. Presently before the Court is Defendants' Motion for Sanctions pursuant to Federal Rule of Civil Procedure 11. For the reasons that follow, said Motion is granted.

I. BACKGROUND

Plaintiff, a former SEPTA employee, alleged that SEPTA unconstitutionally required him to submit to a drug test and terminated his employment when the test result was positive for cocaine. Defendants filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, as well as a Motion for Sanctions under Rule 11. By Order-Memorandum dated May 4, 2005, the Court

granted Defendants' Motion to Dismiss on grounds that Plaintiff's employment was governed by a collective bargaining agreement ("CBA"), which contained both a reasonable suspicion drug testing provision and a grievance and arbitration procedure. The Court determined that the Complaint did not support a Fourth Amendment claim because Plaintiff, as a member of Local 234 of the Transportation Workers Union of America, AFL-CIO ("Local 234" or the "Union"), is bound by the CBA's reasonable suspicion drug testing provision. The Court noted that whether or not Defendants had reasonable suspicion to administer a drug test to Plaintiff was a matter which had to be resolved through the grievance and arbitration procedure governing issues arising under the CBA. The Court explained that the Complaint, therefore, could only state a cognizable Fourth Amendment claim if the question of reasonable suspicion had been resolved in Plaintiff's favor during the grievance process. As the grievance process had determined that Defendants' had acted properly, the Court dismissed Plaintiff's Fourth Amendment claim.

Similarly, the Court determined that the Complaint did not support a Fourteenth Amendment claim because the United States Court of Appeals for the Third Circuit ("Third Circuit") has already determined that the grievance and arbitration provisions at issue in this case incorporate adequate safeguards to ensure that Plaintiff's claims are resolved in a manner consistent with the

demands of due process. Accordingly, the Court dismissed Plaintiff's Fourteenth Amendment claim. Currently before the Court is Defendants' outstanding Motion for Sanctions under Rule 11.

## II. LEGAL STANDARD

Federal Rule of Civil Procedure 11(b) provides in relevant part as follows:

**(b) Representations to Court.** By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,—

. . . .  
**(2)** the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

Fed. R. Civ. P. 11(b). "To comply with this standard, counsel 'must conduct a reasonable investigation of the facts and a normally competent level of legal research to support the presentation.'" Simmerman v. Corino, 27 F.3d 58, 62 (3d Cir. 1994) (quoting Mary Ann Pensiero, Inc. v. Lingle, 847 F.2d 90, 94 (3d Cir. 1988)). It is firmly established that "the Rule 11 test is 'now an objective one of reasonableness' which seeks to discourage pleadings 'without factual foundation, even though the paper was not filed in subjective bad faith.'" Bradgate Assocs., Inc. v. Fellow, Read & Assocs., Inc., 999 F.2d 745, 752 (3d Cir. 1993) (quoting Lony v. E.I. Du Pont de Nemours & Co., 935 F.2d 604, 616

(3d Cir. 1991)).

"When a district court examines the sufficiency of the investigation of facts and law, it is 'expected to avoid the wisdom of hindsight and should test the signer's conduct by [asking] what was reasonable to believe at the time the pleading, motion, or other paper was submitted.'" Id. (quoting CTC Imps. and Exps. v. Nigerian Petroleum Corp., 951 F.2d 573, 578 (3d Cir. 1991)).

Accordingly, courts must:

consider all circumstances surrounding the submission, including the amount of time the signer had to investigate, whether the signing attorney had to rely on a client for information as to the facts, and whether the signer depended on prior counsel or another member of the bar if the case has been transferred.

Id. (citing Fed. R. Civ. P. Advisory Committee Note, 97 F.R.D. 165, 199) (internal citation omitted). Sanctions are appropriate if "the filing of the complaint constituted abusive litigation or misuse of the court's process," Simmerman, 27 F.3d at 62 (quotations omitted), and should only be imposed in exceptional circumstances. Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66, 68 (3d Cir. 1988). "Thus, the mere failure of a complaint to withstand a . . . motion to dismiss should not be thought to establish a rule violation." Simmerman, 27 F.3d at 62.

### III. DISCUSSION

Defendants contend that the instant Complaint was frivolous, and that the Court should impose sanctions pursuant to Rule 11

because Plaintiff's counsel, H. Francis deLone, Jr., knew or should have known that the Complaint was meritless, and purposefully concealed the fact that Plaintiff was a member of Local 234 and bound by the CBA.

A. Sanctionable Conduct

Defendants argue that Mr. deLone should have been aware that the Complaint did not state a claim cognizable under Section 1983 because Mr. deLone himself litigated the cases which established the controlling law in this judicial circuit. As Defendants point out, Mr. deLone represented the plaintiffs in Bolden v. SEPTA, 953 F.3d 807 (3d Cir. 1991) (en banc), and Dykes v. SEPTA, 68 F.3d 1564 (3d Cir. 1995), two cases which involved challenges to the constitutionality of the CBA's reasonable suspicion drug testing provision. In Bolden and Dykes, the Third Circuit determined that the CBA's drug testing provision is constitutional, that SEPTA employees represented by Local 234 are bound by the CBA's drug testing and arbitration clauses, and that they are required to pursue any grievances resulting from allegedly improper testing through arbitration. See Bolden, 953 F.2d 807; Dykes, 68 F.3d 1564. Moreover, Bolden and Dykes established that members of Local 234 can only bring a Fourth Amendment claim if the grievance procedure determined that drug tests violated the CBA's testing provisions, and that they cannot bring a Fourteenth Amendment claim because the CBA's grievance and arbitration provisions satisfy due

process. See Bolden, 953 F.2d 807; Dykes, 68 F.3d 1564. Defendants, therefore, argue that Mr. deLone knew or should have known that the CBA precluded the Fourth and Fourteenth Amendment claims alleged in the instant Complaint. Moreover, Defendants argue that Mr. deLone was aware of Plaintiff's Local 234 membership and the applicability of the CBA because of his prior cases against SEPTA, and because Defendants themselves forwarded Plaintiff's Local 234 membership information to Mr. deLone after the Complaint was filed. Given the Third Circuit's holdings in Bolden and Dykes, Defendants argue that it was improper of Mr. deLone to fail to disclose Plaintiff's Union membership and the relevant CBA provisions to the Court.

Mr. deLone does not dispute that he represented plaintiffs in Bolden and Dykes, and was thus aware of the Third Circuit's holdings. Nor does Mr. deLone dispute that he failed to disclose Plaintiff's Union membership and the applicability of the CBA. Mr. deLone argues, however, that his actions in the instant lawsuit were proper because the United States Supreme Court in Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998), implicitly overruled Bolden and Dykes. In Wright, the plaintiff filed suit alleging that stevedore companies discriminated against him in violation of the Americans with Disabilities Act (the "ADA"), 42 U.S.C. § 2101 et seq., by pursuing his claims in an arbitral forum pursuant to an arbitration clause contained in his union-negotiated

employment contract. Wright, 525 U.S. at 72-74. The lower courts had held that plaintiff was barred from bringing his ADA claim in federal court under the arbitration clause. Id. at 75. In vacating the lower courts' determinations, the Supreme Court held that "any CBA requirement to arbitrate [a statutory claim] must be particularly clear," because "the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA." Wright, 525 U.S. at 80. The Supreme Court concluded that the CBA in Wright did not meet the stringent waiver standard because the CBA's arbitration clause was general and the remainder of the contract contained no explicit incorporation of the employees relevant statutory rights. Id.

According to Mr. deLone, Wright implicitly overrules Bolden and Dykes, and permits SEPTA employees to bring Section 1983 suits based on the constitutional claims raised in Bolden and Dykes, because the CBA does not contain an explicit judicial forum waiver for Section 1983 claims. Mr. deLone's reasoning, however, is severely flawed. Neither Bolden nor Dykes stand for the proposition that the CBA waives the Union members' right to a judicial forum for the resolution of their constitutional claims. Rather, the Third Circuit merely held that (1) individual employees are bound by their bargaining unit's express consent to drug testing, Bolden, 953 F.2d at 828; (2) in ruling on a Union member's Fourth Amendment claim, federal courts are bound by certain factual

questions resolved through the grievance procedure, Dykes, 68 F.3d at 1569; and (3) the CBA's grievance and arbitration procedure satisfies the Fourteenth Amendment due process requirements. Id. at 1571. Indeed, Dykes addressed on the merits the very claims that are raised in the instant Complaint, and concluded that plaintiff's constitutional rights had not been violated. See Dykes 68 F.3d at 1570. Mr. deLone, as counsel who represented the plaintiffs in Bolden and Dykes, is or should be intimately familiar with these decisions. Mr. deLone should thus have realized that Bolden and Dykes did not determine that the plaintiffs were required to vindicate their constitutional rights through arbitration, but rather that the plaintiffs' constitutional rights had simply not been violated.

In Bolden, the Third Circuit determined that "a public employee union acting as an exclusive bargaining agent may consent to drug testing on behalf of the employees it represents," and that "individual employees are bound by such express consent." Bolden, 953 F.2d at 828. Mr. deLone, therefore, knew that Plaintiff was bound by Local 234's express consent to the CBA's drug testing. Moreover, just as in Dykes, Mr. deLone here does not argue that the CBA's suspicion-based testing policy itself violates the Fourth Amendment, but rather that Defendants violated this policy and that this violation rendered the search unconstitutional. This precise question was addressed by the Third Circuit in Dykes, which held

that "whether reasonable suspicion exists in a given case is not a question of law under the Fourth Amendment, but is instead a question of fact to be resolved during the course of the grievance/arbitration process," because it "involv[es] interpretation of the CBA." Dykes, 68 F.3d at 1565, 1570. The Third Circuit went on to note that "under the CBA, both in the details of the drug testing policy where reasonable suspicion is defined and in the applicable grievance procedures, it should have been clear to all parties that this question would be considered and resolved in the grievance proceedings." Id. at 1570. The Third Circuit next reiterated its holding in Bolden that courts "'must defer to [the grievance body's] interpretation of the [CBA's drug testing provision] . . . .'" Id. (citing Bolden, 953 F.2d at 829).

In light of Bolden and Dykes, it should by now have been clear to Mr. deLone that whether reasonable suspicion existed under the CBA's reasonable suspicion drug testing provision could only be determined by the grievance body, and that this determination would be binding on the Court. Moreover, Mr. deLone knew or should have known that the drug test could only implicate Plaintiff's Fourth Amendment right if the grievance body had concluded that SEPTA had not acted on the basis of reasonable suspicion as defined in the CBA, because "[i]f there was reasonable suspicion, and SEPTA, therefore, complied with the terms of its drug and alcohol testing

policy, there is no Fourth Amendment issue." Id. at 1568. Here, Mr. deLone neither pleaded nor argued that Defendants had acted without the requisite reasonable suspicion under the CBA. Indeed, it is undisputed that the grievance body, to which this dispute was properly submitted, concluded that Defendants had acted in accordance with the CBA's reasonable suspicion drug testing provision. As noted above, this determination is binding on the Court. See id. at 1570. Accordingly, Mr. deLone knew or should have known that Plaintiff could state no cognizable Fourth Amendment claim in this action.

Similarly, Mr. deLone knew or should have known that Plaintiff could state no cognizable Fourteenth Amendment claim. In Dykes, the Third Circuit analyzed whether the plaintiff could bring a valid Fourteenth Amendment claim for deprivation of a property interest in his job without due process of law. Dykes, 68 F.3d at 1570-72. The plaintiff in Dykes, like Plaintiff in the instant case, "had available to him a three step grievance process which could have been followed by arbitration. The grievance process was exhausted and, when the union determined not to carry the matter to arbitration, [plaintiff] did not pursue a state court action alleging breach of the duty of fair representation." Id. at 1571. The Third Circuit noted that "[w]here a due process claim is raised against a public employer, and grievance and arbitration procedures are in place . . . those procedures satisfy due process

requirements 'even if the hearing conducted by the Employer . . . [was] inherently biased.'" Id. (quoting Jackson v. Temple Univ., 721 F.2d 931 (3d Cir. 1983)). The Third Circuit noted that "[plaintiff] could have asked a court of common pleas to order arbitration pursuant to the collective bargaining agreement, thereby assuring him of the due process to which he was entitled," and concluded that "[b]ecause he chose not to do so, [plaintiff] is unable to prove a violation of 42 U.S.C. § 1983 by [defendants]." Id. at 1572. Here, Plaintiff similarly failed to pursue a state court action to compel arbitration. Mr. deLone, therefore, knew or should have known that the allegations of the instant Complaint could not state a valid Fourteenth Amendment claim cognizable under Section 1983.

Mr. deLone's failure to so much as acknowledge the Third Circuit's controlling holdings in Bolden and Dykes, which Mr. deLone himself litigated, and which were again brought to his attention by defense counsel prior to the filing of the instant Motion, is inexcusable. Indeed, Mr. deLone never once referred to either case in his memorandum in opposition to Defendants' motions to dismiss and for sanctions, nor did he mention the proper legal standard applicable to the respective motions. Rather, Mr. deLone based his entire memorandum exclusively on the Supreme Court's decision in Wright, which as discussed above is plainly not controlling to the disposition of the instant case.

Given the clear and direct bearing of the Third Circuit's decisions in Bolden and Dykes on the CBA at issue in this case, it is even more perplexing that Mr. deLone failed to acknowledge the existence of the CBA and its drug testing and arbitration provisions in the Complaint. It is well established that "[a]n attorney's obligation to the court is one that is unique and must be discharged with candor and great care." Baker Indus., Inc. v. Cerberus, Ltd., 764 F.2d 204, 212 (3d Cir. 1985). Moreover, "[a]s an officer of the court, an attorney must comport himself/herself with integrity and honesty when making representations regarding a matter in litigation." LaSalle Nat'l Bank v. First Conn. Holding Group, LLC, 287 F.3d 279, 293 (3d Cir. 2002). Mr. deLone's failure to disclose the fact that Plaintiff was bound by the CBA, which he knew to be an important consideration under Bolden, Dykes, and even under his interpretation of Wright, is in direct conflict with Mr. deLone's duty of candor to the court.

The Court, therefore, finds that it was unreasonable of Mr. deLone to file the instant Complaint, which he should have known to be without any legal basis, and that it was equally unreasonable of Mr. deLone to ignore the established caselaw of this judicial circuit as well as the CBA. Had Mr. deLone engaged in a reasonable investigation of the law, as required under Rule 11, the Complaint's frivolousness and the flaws of his legal reasoning in opposition to Defendants' motions to dismiss and for sanctions

would have, or should have, become apparent to him. Accordingly, the Court concludes that sanctions are appropriate in this case.

B. Appropriate Sanction

Rule 11(c) states that “[i]f . . . the court determines that subdivision (b) has been violated, the court may . . . impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.” Fed. R. Civ. P. 11(c). In choosing an appropriate sanction, courts should impose a punishment which at a minimum “serve[s] to adequately deter the undesirable behavior.” Zuk v. E. Pa. Psych. Inst. of the Med. College of Pa., 103 F.3d 294, 301 (3d Cir. 1996). “Although sanctions may properly include an award of counsel fees and expenses to the adversary, the prime goal should be deterrence of repetition of improper conduct, and an award of counsel fees or other monetary sanction should not automatically be the sanction of choice.” Waltz v. County of Lycoming, 974 F.2d 387, 390 (3d Cir. 1993). Permissible sanctions thus include not only fee-shifting and monetary penalties to be paid into the court, but also reprimands, orders to undergo continuing legal education, and referrals to disciplinary authorities. See Morrow v. Blessing, No. Civ. A. 04-1161, 2004 WL 2223311, at \*8 (E.D. Pa. Sept. 29, 2004) (citing Zuk, 203 F.3d at 301). Here, the Court concludes that counsel fees and costs are the most appropriate sanction. As the assertion of legal principles and matters of law falls solely

within the duty of the attorney, monetary sanctions for a violation of Rule 11(b)(2) are awarded solely against the attorney, and not against a represented party. See Fed. R. Civ. P. 11(c)(2)(A) ("Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2)."). Accordingly, the Court imposes monetary sanctions against Mr. deLone only.

In determining the proper amount of fees, courts should consider mitigating factors such as whether the attorney has a history of this kind of behavior, the defendants' need for compensation, the degree of frivolousness, and the willfulness of the violation, and undertake an investigation into an attorney's ability to pay. Zuk, 103 F.3d at 301. The Court notes that Mr. deLone was previously sanctioned after he failed to voluntarily withdraw a complaint that had been rendered frivolous by the Third Circuit's intervening decision in Dykes. See Loftus v. SEPTA, 8 F. Supp. 2d 458 (E.D. Pa. 1998). In addition, the Court notes that Mr. deLone was sanctioned in another Section 1983 case, in which the court determined that Mr. deLone "could not reasonably have believed in the legal soundness of th[e] case." Morris v. Orman, Civ. A. No. 87-5149, 1992 WL 398363, at \*5 (E.D. Pa. Dec. 31, 1992). In Morris, just as here, Mr. deLone filed the lawsuit "bottomed on the very same bases that [the district court] and the Third Circuit had rejected" in a prior case also litigated by Mr. deLone. Id. at \*5-6. Moreover, in Morris, just as in this case,

Mr. deLone never brought the earlier dispositive case law to the court's attention. Id. This history of improper behavior weighs heavily towards imposing significant sanctions in this case. The Court further notes that Defendants' need for compensation here is significant. Indeed, had Mr. deLone properly researched the applicable law and refrained from filing the instant Complaint, Defendants would not have had to retain counsel in the first place. Finally, as discussed above, Mr. deLone's conduct in this case was particularly frivolous and willful. Mr. deLone not only frivolously argued that Wright controlled the disposition of this case, but also chose to ignore the CBA as well as Bolden and Dykes, two cases which Mr. deLone himself litigated, knew to be directly on point, and was reminded of by defense counsel both prior to the filing of the instant Motion and in the Motion's accompanying memorandum of law. Mr. deLone's conduct, therefore, does not involve inadequate legal research. Rather, Mr. deLone willfully ignored established Third Circuit precedent and frivolously argued that Wright governed the claims raised in the instant Complaint. Nonetheless, the Court is mindful of the fact that the purpose of Rule 11 sanctions is deterrence rather than fee-shifting. Accordingly, the Court concludes that sanctions in the amount of the attorney's fees and costs reasonably incurred by Defendants and no greater than necessary to adequately deter Mr. deLone from engaging in similar conduct in the future are appropriate. The

Court, however, is not currently in possession of any information regarding the amount of counsel fees and costs incurred by Defendants, the amount of sanctions that would adequately deter Mr. deLone from engaging in similar conduct in the future, and Mr. deLone's ability, or inability, to pay sanctions. Accordingly, defense counsel shall file a bill detailing the amount of attorney's fees and costs incurred in defending this action and in filing the instant Motion within ten days of the date of this Memorandum and Order. Within ten days of the filing of Defendants' bill of attorney's fees and costs, Mr. deLone shall file a response addressing the amount of sanctions that would serve as an adequate deterrence in this case and a sufficiently detailed financial affidavit so that the Court can consider Mr. deLone's ability to pay.

### III. CONCLUSION

For the foregoing reasons, Defendants' Motion for Sanctions is granted and Mr. deLone is ordered to pay all reasonable attorney's fees and costs incurred by Defendants in defending this action and pursuing the instant Motion, to the extent that such fees are necessary to adequately deter Mr. deLone from engaging in similar conduct in the future and consistent with his ability to pay.

An appropriate Order follows.

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O R D E R

**AND NOW**, this 8th day of August, 2005, upon consideration of Defendants' "Motion for Sanctions under Rule 11" (Doc. No. 3), all documents submitted in response thereto, and the argument held on May 11, 2005, **IT IS HEREBY ORDERED** that said Motion is **GRANTED**. **IT IS FURTHER ORDERED** that:

1. Defense counsel shall **FILE** a bill of attorney's fees and cost incurred by Defendants in defending this action and in pursuing the instant Motion within ten (10) days of the date of this Order; and
2. Mr. deLone shall **FILE** a response addressing the amount of sanctions that would serve as an adequate deterrence within ten (10) days of the filing of Defendants' bill of attorney's fees and costs, and shall **INCLUDE** a financial affidavit for *in camera* inspection by the Court so that the Court can consider his ability to pay.

BY THE COURT:

/s/ John R. Padova

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John R. Padova, J.